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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 148

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR. and FREDERICK HARGRAVES,

Petitioners,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioners,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled cases on January 8, 1964.

Citation to Opinion Below

The opinion of the Supreme Court of Tennessee is not yet reported and is set forth in the appendix hereto, *infra* pp. 1-13a with the opinion on Petition to Rehear at pp. 16-17a.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered on January 8, 1964 (App. p. 15a). Petition for rehearing was denied March 5, 1964 (App. p. 18a).

Jurisdiction of this Court is invoked pursuant to Title 28, U. S. C., Section 1257(3), petitioners having alleged below, and alleging here, deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

Questions Presented

Whether petitioners, Negro college students, were denied rights protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution:

1. By arrest and conviction for unlawful conspiracy after peacefully protesting against racial segregation in a "white" restaurant where they were denied entrance and service solely because they were Negroes and where racial segregation was permitted and encouraged by state statute.

2. By the use of state police officials to arrest and state courts to convict petitioners for unlawful conspiracy for the distinct purpose of enforcing the racially discriminatory practices of a restaurant owner.

3. By conviction on a record devoid of any evidence of the essential elements of unlawful conspiracy.

4. By affirmance of their convictions in the Supreme Court of Tennessee on a ground not litigated in the trial court thereby denying them an appeal which considered the case as it was tried.

5. By the trial judge in twice instructing the jury that petitioners were charged with violating a law under which they had not been indicted and which was not even a criminal statute.

6. By trial by an all white jury whose admitted personal practice, custom, philosophy and belief in racial segregation precluded petitioners' having a fair and impartial

jury of their peers, and by the trial judge's refusal to dismiss jurors challenged by petitioners for good cause.

Statutory and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States and the following sections of the Code of the State of Tennessee:

> 39-1101. *"Conspiracy" defined.*—The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce . . .
>
> 62-710. *Right of owners to exclude persons from places of public accommodation.*—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person

over his private house, vehicle, or private theater, or places of amusement for his family.

62-711. *Penalty for riotous conduct.*—A right is given to any keeper of any hotel, inn, theater, or public house, common carrier, or restaurant against any person guilty of turbulent or riotous conduct within or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars ($100), and the offenders shall be liable to a forfeiture of not more than five hundred dollars ($500), and the owner or persons so offended against may sue in his own name for the same.

Statement

These are eight sit-in convictions arising out of a single trial in Nashville, Tennessee.[1] Petitioners, all Negroes, were arrested between 12:30 and 1:00 P.M. at the Burrus and Webber Cafeteria[2] (B.E. 765) and charged under a grand jury indictment[3] (R. 9-13) alleging that they:

> On the 21st day of October, 1962, and prior to the finding of this presentment, with force and arms in the

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[1] A single record and transcript of testimony exists for all eight petitioners and a single opinion, affirming the convictions, was written by the Supreme Court of Tennessee (App. pp. 1-13a).
Reference to the Technical Record will be designated (R. —), and to the Bill of Exceptions (B.E. —).

[2] Burrus and Webber Cafeteria will hereafter be referred to as B. & W.

[3] Petitioners were arrested without warrants by Nashville police officers and originally charged with violating City Code Chapter 26, Section 59 (state law regarding sit-ins) (B.E. 885). Later, on the same day, warrants were issued charging them with unlawful conspiracy. The grand jury presentment was made on December 12, 1962 (R. 8).

> County aforesaid, unlawfully, willfully, knowingly, deliberately and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation located at 226 Sixth Avenue, North, Nashville, Davidson County, Tennesee (R. 9).

After trial and conviction in the County Court of Davidson County, Tennessee, petitioners were sentenced to ninety (90) days in jail and fifty dollars ($50.00) fine[4] (R. 39, 40). Appeals were taken to the Supreme Court of Tennessee which affirmed the convictions (R. 54). It is from this affirmance that this petition for writ of certiorari is brought.

Around noon on October 21, 1962, eight young Negro men, all college students, quietly entered the front door[5] of the B. & W. Cafeteria (B.E. 766). Two swinging doors on the sidewalk opened on the vestibule (B.E. 767), six feet by four feet in size (B.E. 1070).[6] Another set of swinging doors led into the dining room (B.E. 767).

As petitioners approached the second doors, they were met by Otis Williams, the doorman (B.E. 1071), and told, "We don't serve colored people in here. I want to be nice to you but we don't serve 'em . . . and you can't come in"

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[4] The jury recommended a fine of less than fifty dollars ($50.00) (R. 38), but the trial judge later imposed the severer sentence.

[5] The cafeteria had a front entrance and a back entrance (B.E. 825).

[6] Estimates on the size of the vestibule varied from four feet by four feet (B.E. 767) to twelve feet by twelve feet (B.E. 903), though Otis Williams, the doorman at B. & W. testified that he measured it as six feet by four feet (B.E. 1070).

(B.E. 1071).[7] Petitioners remained standing in the vestibule for approximately "20 or 25 minutes" when they were arrested (B.E. 772). They committed no act other than attempting to walk through the swinging doors into the cafeteria (B.E. 771, 1098). People were walking in front of the cafeteria, and estimates of the number of people who stood by or near the outside door of the vestibule varied from three or four to seventy-five or one hundred (B.E. 780, 787, 808, 828, 918-919, 956). It was not established how many, if any, of those standing outside desired to enter the B. & W. or were just curious observers. No witness testified that they were prevented either from entering or leaving the cafeteria (B.E. 782-792, 809-810, 841, 892-895, 919-923, 933, 948-949, 960, 1000, 1005, 1025, 1032-1033, 1039), nor was there evidence of any turbulent, riotous or disorderly conduct, by petitioners or others, either inside or outside the cafeteria.

W. W. Carrier, Manager of B. & W., informed of petitioners' presence, entered the vestibule (B.E. 766) and testified that he "discovered a large gathering of people[8] . . . on the outside and eight young Negroes were in the vestibule in between the two doors" (B.E. 766). Carrier did not speak to petitioners (B.E. 771). He called the police and went outside to wait for them (B.E. 771). He testified:

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[7] Williams, a 64 year old man weighing only 140 pounds, held the door and kept petitioners out while allowing white patrons in the vestibule to enter the cafeteria, one at a time, through a "crack in the door" (B.E. 1070-1071, 1078-1080). He stated he was hired to keep Negro patrons out (B.E. 1088) and was ordered to lock the doors if Negroes came (B.E. 1097). When petitioners arrived, Williams "caught the door going into the cafeteria and stopped them there, and the white people, too . . ." (B.E. 1065).

[8] Carrier did not estimate the number of people.

Q. As you attempted to pass through the vestibule, what, if anything, occurred?

A. Well, actually nothing, sir. The—the young men were standing in position, and it was just a matter of my easing through the crowd (B.E. 772).

Petitioners informed him that they were seeking service (B.E. 775), but Carrier refused because they were Negroes[9] (B.E. 776). At no time did he order petitioners to leave.[10] His sole comment was to request that they move back and let a lady get out (B.E. 773) which petitioners did (B.E. 773). He admitted that persons were able to get in and out of the cafeteria.[11]

Several patrons of B. & W. testified that the doorman was holding the door so the petitioners could not enter, thus causing the congestion (B.E. 785, 893).[12] All entered

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[9] On cross-examination Carrier stated:

"Q. You have the facilities to serve them?
A. We do have.
Q. Was your place of business crowded at the time?
A. It was beginning to be crowded, sir.
Q. Now, the only reason that you didn't serve them was that they were Negroes and not white, wasn't it?
A. Yes, sir.
Q. And the same boys, seeking service would have been all right if they were white?
A. Yes, sir" (B.E. 776-777).

[10] Carrier testified he did not swear out warrants against petitioners and had no idea how his name appeared on them as prosecutor (B.E. 823).

[11] "Q. What occurred to those persons in their attempt to gain access to the cafeteria and leave?
A. Well, it was a little crowded . . ." (B.E. 770).

[12] Charles Edwards stated:

"Q. If the doorman hadn't blocked the door, they would have gone in the place, so that ingress and egress would have been free? Wouldn't it?
A. I suppose so, if he had wanted Negroes in, too.
Q. Yes, sir, the doorman was blocking them so that they couldn't get in?

the cafeteria though a few spoke of having to "elbow" or "push" their way through (B.E. 814, 933). Most entered without any difficulty at all.[13]

Two witnesses testified that petitioners were "pushing and shoving" in the vestibule (B.E. 900-901, 977). However, they admitted that petitioners used no bad language and committed no disorderly act (B.E. 977). One witness testified that as she approached the restaurant she heard someone say, "When we get there, just keep pushing, don't stop. Just keep on pushing," that she looked around and saw a group of Negroes who passed her on the street and entered the restaurant (R. 971, 987-990). No evidence, however, was offered to prove that petitioners agreed or conspired to block the entrance of B. & W.

A. The doorman was holding the door and the Negroes were blocking the vestibule so they couldn't get in there.
Q. . . . The doorman was the one who was blocking the door and keeping people out? Wasn't he?
A. He was holding the Negroes out and as a result, they had the vestibule blocked and the other people couldn't get by."

[13] Mrs. Charles Edwards testified that she "just went right in" (B.E. 799). Mickey Lee Martin testified:

"Q. You had no trouble getting in?
A. No, sir.
Q. Did you have to ask them to let you in?
A. Sir?
Q. Did you have to ask these colored boys to let you in?
A. Yes, sir.
Q. And did they let you in?
A. Yes, sir, they let me in" (B.E. 882).

Patrolman Pyburn went to the B. & W. and testified that petitioners were standing four on either side of the vestibule and that "a person medium sized could get in" (B.E. 1030-1031).

How the Federal Questions Were Raised and Decided Below

After motions to remand the cases from the County Court of Davidson County, Tennessee to the Court of General Sessions were denied on January 4, 1963 (R. 22), petitioners, on January 10, 1963, filed a motion to quash the grand jury presentment and to dismiss alleging that (1) the State of Tennessee, through its judicial officers, was enforcing a policy of racial discrimination contrary to the Fourteenth Amendment to the United States Constitution; (2) the State was forbidden by the Fourteenth Amendment from prosecuting defendants under T. C. A. §62-711; (3) the acts charged constituted no crime; (4) the presentment neither alleged nor showed defendants conspired to do an unlawful act or an unlawful act by unlawful means; and (5) the rights exercised by petitioners were protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. January 15, 1963, motion to quash and to dismiss overruled (R. 27).

January 30, 1963, defendants filed motion to quash the presentment or, in the alternative, to require the State to make an election as to which of the state statutes alleged in the indictment to prosecute the defendants under (R. 28). February 1, 1963, motion overruled and defendants excepted (R. 29). Upon arraignment on March 5, 1963, defendants entered pleas of not guilty (R. 30). Defendants were convicted in the County Court of Davidson County, Tennessee on March 9, 1963 (R. 38). The jury recommended a fine of less than fifty dollars ($50.00). March 19, 1963, the court entered judgment and sentenced defendants to fifty dollar ($50.00) fines and ninety (90) days in the County Workhouse (R. 39, 40).

April 18, 1963, petitioners filed motions for new trial on the grounds that: (1) the court erred in overruling defendants' motions to remand the cases to the Court of General Sessions; (2) the court erred in overruling defendants' motion to quash the presentment and to dismiss the action; (3) the court erred in overruling defendants' motion to quash the presentment or, in the alternative, to require the State to make an election as to which of the state statutes alleged in the indictment to prosecute the defendants under; (4) the statutes under which defendants were arrested, tried and convicted were unconstitutional because they failed to warn defendants of the conduct proscribed and contained no standards upon which a judicial determination of guilt could be made, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution; (5) T. C. A. §62-710, one of the statutes under which defendants were charged, is not a criminal statute and conviction thereunder denied due process secured by the Fourteenth Amendment; (6) T. C. A. §§39-1101-(7), 62-710 and 62-711 were unconstitutionally applied to petitioners' conduct because used to enforce racial segregation in facilities licensed by the State, open to the public, and invested with a public interest, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; (7) the arrest, trial and conviction of defendants were for the sole purpose of enforcing the discriminatory practices of a restaurant owner contrary to the due process and equal protection clauses of the Fourteenth Amendment; (8) there was no evidence that defendants committed any act either a breach of the peace, injurious to the trade or commerce or turbulent and riotous; (9) prosecution of defendants denied them the right of free assembly and protest guaranteed by the First and Fourteenth Amendments to the United States Constitution; (10) defendants were tried and convicted by a jury from

which all Negro veniremen were deliberately and systematically challenged by the State, depriving them of a fair and impartial jury in violation of Article 1, Section 9 of the Constitution of the State of Tennessee and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; (11) the court erred in holding certain white jurors competent who admitted a prejudiced attitude toward defendants contrary to Article 1, Section 9 of the Constitution of Tennessee and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; (12) there was no evidence of guilt of the offense charged in the presentment; (13) the evidence preponderated in favor of defendants' innocence; (14) the court's judgment and sentence were contrary to the jury verdict and deprived defendants of rights secured by the due process clause of the Fourteenth Amendment; (15) the court erred in denying certain instructions to the jury requested by defendants contrary to the equal protection and due process clauses of the Fourteenth Amendment to the United State Constitution (R. 41-50).

Motion for new trial was overruled May 10, 1963 (R. 53). Defendants excepted and "prayed an appeal in the nature of a writ of error" to the Supreme Court of Tennessee (R. 54). Bill of Exceptions to the County Court order overruling motion for new trial filed May 31, 1963 (R. 63).

On appeal to the Supreme Court of Tennessee the convictions were affirmed. The Court held that:

> These defendants physically blocked the entrance to the B&W Cafeteria by placing themselves in the small vestibule so as to prevent people from entering or leaving; and that entrance to and exit from the restaurant was not possible without squeezing and worming through the wall of flesh created by the defendants'

> presence and position. The evidence likewise shows that in blocking this entrance the defendants were pushing and shoving to some extent in an effort to enter this restaurant, but were prevented from doing so because the doorman kept the inner door closed to them.

It further held that:

> While the request for admittance by the defendants was not criminal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises of the restaurant, the method they employed to effect their admittance was clearly unlawful.

The Court stated that the dispositive question on appeal was whether or not the evidence showed that defendants used unlawful means; blocked the doorway of B. & W.; concluded that they did.

Petition for rehearing filed and denied March 5, 1964 (App. 16, 17a).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

I.

Petitioners' Convictions Offend the Fourteenth Amendment to the United States Constitution in That They Constitute State Enforcement of Racial Discrimination.

A. *The State of Tennessee Has by Statute Permitted and Encouraged Racial Segregation in Restaurants.*

The undisputed and sole basis for petitioners' arrest and conviction was racial discrimination. At the time of arrest, petitioners were seeking service at B. & W., a white restaurant in the City of Nashville, Tennessee. When refused entrance to the B. & W., they quietly remained in the vestibule until arrested. They were jailed and originally charged with violation of the "state law regarding sit-ins" (B.E. 765). Later, the Davidson County grand jury returned a presentment charging petitioners with unlawful conspiracy to injure trade or commerce by attempting to compel white restaurateurs, including the owners of B. & W., to serve Negroes contrary to their policy of racial segregation.[14]

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[14] The presentment alleged, *inter alia*, that:

. . . Under the provisions of §62-710 of the Code of Tenn., the owner of said cafeteria reserved the right not to admit and to exclude from said cafeteria any person the owner, for any reason whatsoever, chose not to admit or serve in said cafeteria.

Among the rules established by the owner of said B. & W. was one that they would serve food only to persons of Caucasian descent, or white persons, and not to serve food to persons of African descent, or colored persons, and said B. & W. Cafeteria was known to the general public as a cafeteria and dining place, privately owned, serving food only to white persons.

The manager and the doorman[15] of B. & W. stated petitioners were refused service solely because they were Negroes (B.E. 776-777). In his charge the trial judge expressly instructed the jury to convict if it found petitioners conspired to violate, *inter alia*, T. C. A. §62-710, providing that a restaurateur may exclude persons for "any reason whatsoever," including race. *Lasater* v. *State*, 68 Tenn. 584 (1877).[16]

It is patently clear from these facts that the purpose of petitioners' arrest and conviction was to enforce racial discrimination which was permitted and, indeed, encouraged by T. C. A. §62-710. It is equally clear that such state sanction of racial discrimination conflicts with the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (Stewart, *J.*, concurring). (When a state law sanctions racial discrimination in restaurants, the 14th Amendment is invoked.)

In *Peterson* v. *City of Greenville*, 373 U. S. 244, this Court reversed trespass convictions where state law required a restaurant owner to discriminate and stated:

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[15] Indeed, the doorman was expressly hired for the purpose of keeping Negroes out (B.E. 1088).

[16] In 1875, the State of Tennessee repealed its Common Law innkeeper rule requiring innkeepers to serve all on an equal basis and passed T. C. A. §62-710 permitting them to discriminate. And see *Turner* v. *Memphis*, 369 U. S. 350 (1962). There a restaurant owner set up as a defense to an action brought to enjoin racial segregation in the Dobbs House Restaurant in the City of Memphis T. C. A. §§53-2120, 53-2121, which authorized the Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations . . . as may be necessary pertaining to the safety or sanitation of hotels and restaurants . . ." The Inspection Division passed a regulation providing that "restaurants catering to both white and Negro patrons" should be arranged so that each race is properly segregated (Regulation No. R-18(L)). Dobbs House later amended its answer to include a defense based on T. C. A. §62-710 as justification for its discrimination.

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice (373 U. S. at 248).

When the state passes a law, as here, permitting and encouraging persons to discriminate against other persons because of race, and the state's judicial processes are employed to enforce that same discrimination, such a "palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminator" (*Peterson, supra* at 248).

In *Lombard* v. *Louisiana*, 373 U. S. 267, there was no segregation provision but certain city officials had made pronouncements regarding segregation in restaurant facilities. This Court found this constituted state compulsion of racial discrimination and reversed trespass convictions.

The state's involvement here is much stronger than, or at most equal to, that in *Lombard*. Indeed, existence of a state statute permitting and encouraging restaurateurs to discriminate brings this case within the prohibition of *Peterson*.

B. *The State of Tennessee by Arrest and Criminal Conviction of Petitioners Deprived Them of Equal Protection of the Laws.*

The issues presented by this petition are almost identical to those presented in the "Sit-in" cases now pending before this Court in *Barr* v. *City of Columbia*, No. 9, October Term, 1963; *Bouie* v. *City of Columbia*, No. 10, October Term, 1963; *Bell* v. *Maryland*, No. 12, October Term, 1963; *Robinson* v. *Florida*, No. 60, October Term, 1963; and *Griffin* v. *Maryland*, No. 6, October Term, 1963. Here, as

in those cases, the question presented is whether a state may enforce, by arrest and criminal conviction, racial discrimination in public accommodations, particularly where, as here, the state has been significantly involved in the acts of discrimination. That petitioners were in a cafeteria vestibule and not at a lunch counter, and charged with unlawful conspiracy rather than trespass, does not materially change the issues involved. As the questions presented are identical with, or similar to, issues now pending before this Court in other cases where certiorari has been granted, review of this petition is manifestly appropriate. Compare *Trustee of Monroe Ave. Church of Christ* v. *Perkins*, 334 U. S. 813, with *Shelley* v. *Kraemer*, 334 U. S. 1.

There is no question but that the State of Tennessee, by arrest and criminal conviction, has "place[d] its authority behind discriminatory treatment based on race." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (Frankfurter, *J.*, dissenting). No question exists but that this constitutes state action forbidden by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1; *Buchanan* v. *Warley*, 245 U. S. 60. State action is further involved here because the State of Tennessee has fostered and buttressed racial segregation by state law,[17] custom and tradition and has thereby significantly contributed to and supported the racial discrimination practiced by B. & W.

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[17] In Tennessee, Negroes and whites have been prohibited from studying together (Art. 11, Const. of Tenn., §12; T. C. A. §§49-3701 (held unconstitutional in *Roy* v. *Brittain*, 201 Tenn. 140, 297 S. W. 2d 72), 3702, 3703, 3704 (invalidated in *Kelley* v. *Board of Education*, 270 F. 2d 209 (6th Cir. 1959); going to prison together (T. C. A. §§41-303, 41-1217); marrying one another (T. C. A. §§49-3704, 36-402); riding streetcars together (T. C. A. §§65-1704-1709); or trains (T. C. A. §§65-1314-1315); using the same washhouses in coal mines (T. C. A. §§58-1021, 58-1412). Moreover, Tennessee law expressly permits hotels to provide separate accommodations for Negroes and whites (T. C. A. §62-715).

Moreover, in addition to this, the State of Tennessee has refused to protect petitioners' primary right to equality against the narrow, less significant property claim of restaurant owners and has actively endorsed and supported restaurateurs' "right to discriminate" by statute as well as by use of the state judicial process. Such palpable use of state power to enforce inequality far exceeds the threshold required to invoke the Fourteenth Amendment's limitations. *Shelley* v. *Kraemer*, 334 U. S. 1.[18]

In summary, the evidence leads to the inescapable conclusion that these convictions are no less or more than state enforcement of racial discrimination. The grand jury presentment charging defendants with unlawful conspiracy expressly recognized and relied upon T. C. A. §62-710 as authorizing B. & W.'s racial discrimination as did the trial judge in his instructions to the jury. This, added to the use of police officials to arrest and state courts to criminally punish petitioners solely to enforce a racial exclusion policy sanctioned by the state, in a restaurant licensed by the State and open to the public, is such overwhelming state participation in racial discrimination as to be clearly prohibited by the Fourteenth Amendment to the Constitution of the United States.

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[18] In *State of Delaware* v. *Brown*, 195 A. 2d 379 (1963), the Supreme Court of Delaware reversed trespass convictions against Negroes who refused to leave a restaurant after being requested to leave solely because of race and held that:

> ". . . Judicial action by the State to prosecute and convict defendant for trespass would constitute an encouragement of the actions of the proprietor in excluding defendant upon racially discriminatory grounds. This the State cannot do. As we have previously held, the owner or proprietor of a place of public accommodation, with the exceptions noted, may not be compelled by the State to accept patrons who are personally offensive to him or his customers. It is equally true, therefore, that the State may not compel the Negro patron to leave the place of public accommodation. To do so would place the weight of state power behind the discriminatory action of the owner or proprietor."

II.

These Convictions Deny Due Process of Law Because Based on No Evidence of the Essential Elements of the Crime of Unlawful Conspiracy.

The indictment under which petitioners were charged alleged that they:

> . . . with force and arms, unlawfully, willfully, knowingly, deliberately and intentionally, did unite, combine, conspire, agree and confederate between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade or commerce of Burrus and Webber . . .

In its opinion the Supreme Court of Tennessee stated:

> Section 39-1101, T. C. A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead to a breach of the peace (App. 4a).

The court further stated that:

> . . . Conspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two

or more persons to do something unlawful, either as a means or as an ultimate end.[19]

At the time of arrest, petitioners were merely seeking service at B. & W. in a peaceful manner. Of the numerous witnesses at trial, not one testified to being unable to enter or leave the cafeteria, nor did they see any other person who was prevented from entering or leaving B. & W. while petitioners were present. Most testified that they "had no trouble getting in" (B.E. 888, 892, 1030-1031, 1038). No witness testified that petitioners committed any disorderly act or acts which constituted a breach of the peace. They used no bad language and did not force themselves past the doorman who held the door. Although petitioners were told "we don't serve colored people in here" and "you can't come in" (B.E. 1071), no one asked them to leave the vestibule where they remained until they were arrested.

Two witnesses testified that petitioners were "pushing" and "shoving" (B.E. 917, 977). However, it was not established whether this pushing and shoving resulted from the natural congestion in the vestibule caused by the doorman's blocking the door or by petitioners' actions alone. Moreover, a few white patrons stated that they "pushed" inside the vestibule . . . One man testified that he "kind a pushed" his way in (B.E. 845) and another testified that he "push[ed] my way through with my boy . . . I did a little pushing" (B.E. 933).

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[19] For construction of Tennessee conspiracy statute see: *Delaney* v. *State*, 164 Tenn. 432 (Persons must unite and agree to pursue an unlawful enterprise); *Aymett* v. *State*, 310 S. W. 2d 460; *Cline* v. *State*, 319 S. W. 2d 227 (gist of conspiracy is agreement to effect unlawful end, but, before offense is complete, party to conspiracy must commit some 'overt act'. But cf. *Smith* v. *State*, 205 Tenn. 502 (overt act not required).

Petitioners were not "ugly" or "disrespectful" but were, as one witness testified, "just there" [20] (B.E. 799-800). No witness testified that violence occurred or was even remotely threatened. No rude remarks or gestures were made either by petitioners or by any white persons in or around B. & W.

More importantly, not a mite of proof was offered to establish that petitioners conspired or agreed to obstruct the passageway at B. & W. As already stated, not one witness was prevented from entering or saw anyone else prevented from entering B. & W.,[21] so clearly the passageway was not blocked. And to the extent that it was congested, this stemmed from the doorman's barring the door.

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[20] One woman, however, testified that a defendant "embarrassed" and "humiliated" her (B.E. 976) because he allegedly called her a "hypocrite." On cross-examination she stated that the defendant had said of all the people in the restaurant:

> "Look at them sitting in there, supposed to be christians, just come from church, but they are just a bunch of hypocrites" (B.E. 917).

[21] Indeed, Patrolman Pyburn stated that when he arrived at B. & W. four of the petitioners were standing on either side of the door and there was ample room for him to enter (B.E. 1029). Policeman Moran testified:

> "Q. When you arrived at B. & W. restaurant, what did you do?
>
> A. We went over to the restaurant and seen four boys standing on either side of the restaurant and I turned around and went back to the car and called for our superior officer" (B.E. 1024).

Moran further testified on cross-examination:

> "Q. And you went into the vestibule there? And you had plenty of room to go in?
>
> A. Yes, sir, but it was kind of hard to do without hitting one of these boys with the door.
>
> • • • • •
>
> Q. Yes, what I mean is—you were able to get through it?
>
> A. Oh, I could get through it, yes" (B.E. 1038).

There was no direct evidence of an agreement by petitioners to do anything. The only agreement reasonably inferable from their conduct is that they agreed to go to the restaurant and seek service—admittedly lawful conduct.[22] As there was no blocking of the doorway, there is no basis for inferring an agreement to block the door. Indeed there is no indication that petitioners knew or could have known that a doorman had been hired to keep them out and would bar entrance to the door upon their arrival, thus causing the congestion. The evidence utterly fails to support the Supreme Court of Tennessee's conclusion that they employed unlawful means by obstructing the passageway. Nor is argument required to show that the evidence fails to support any finding of conduct either "riotous," "turbulent," or likely to cause a "breach of the peace." Yet the Supreme Court of Tennessee found that there was sufficient proof of conduct "having the nature of a riot or disturbance of the peace so as to warrant conviction" (App. 6a).

Not only, therefore, was there no evidence that petitioners conspired to commit an unlawful act, the record solidly refutes the Supreme Court of Tennessee's conclusion that the means employed were unlawful.

This case is not materially different from the ordinary sit-in cases, where Negroes have been convicted for trespass after remaining at lunch counters when requested to leave by restaurant owners, solely because of race. No constitutional difference exists between sitting quietly on

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[22] The Supreme Court of Tennessee stated:

> While the request for admittance by the defendants was not criminal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises, the method they employed to effect their admittance was clearly unlawful.

a lunch stool and standing quietly in a vestibule to protest racial discrimination. This Court has found no problem in reversing sit-in convictions based on no more evidence than the Negroes' "mere presence" at white restaurants. *Garner* v. *Louisiana,* 368 U. S. 157. Here as in *Garner,* the petitioners were not ordered to leave by the restaurateur or his employees.

It has been recognized that a Negro sitting at a lunch counter in a southern state to protect racial segregation is engaged in a type of expression protected by the Fourteenth Amendment. *Garner* v. *Louisiana, supra* (Mr. Justice Harlan, concurring). If, therefore, petitioners' conduct is construed to constitute an unlawful conspiracy, then the statute under which they were charged and convicted is unconstitutionally vague in that it failed to warn petitioners that it was unlawful to quietly remain in a cafeteria vestibule and because, if so construed, it limits petitioners' right of free expression. *Garner* v. *Louisiana, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Winters* v. *New York,* 333 U. S. 507, 509.

Since the State offered no evidence of an agreement or combination to commit any act, or of the commission of any acts other than peaceably seeking equal food service as Negroes in a restaurant licensed and regulated by the State, open to the public and invested with the public interest, which acts the State is constitutionally proscribed by the Fourteenth Amendment from declaring unlawful or prohibiting through the exercise of State power, these convictions rest on no evidence whatever and therefore deny petitioners due process of law. *Taylor* v. *Louisiana,* 370 U. S. 154; *Thompson* v. *Louisville,* 362 U. S. 199.

III.

Petitioners Were Denied Due Process in That Their Convictions Were Affirmed on a Ground Not Litigated in the Trial Court.

The petitioners were tried and convicted under a grand jury presentment which was drawn on the theory that the B. & W. Cafeteria was legally entitled under Tennessee law (§62-710) to exclude petitioners because of their race (R. 10). The trial judge read the presentment and also §62-710 to the jury (B.E. 1104-1107; 1110), and refused a requested instruction that the cafeteria had no legal right to exclude persons because of race (B.E. 1126).

However, the Tennessee Supreme Court purported to decide the case on the assumption "for the sake of argument that discrimination based on race by a facility such as this cafeteria does violate the due process and equal protection clauses" (App. 5a-6a). The court asserted that the only question, given this assumption, was whether the method that petitioners adopted was illegal (App. 6a). The Supreme Court of Tennessee disposed of the claimed trial error in refusing an instruction that the cafeteria had no legal right to refuse service on the basis of race by saying (App. 10a):

> As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway.

The fallacy of this reasoning is that the case was not submitted to the jury on this basis. The jury received the case on the theory that the petitioners had lawfully been

excluded from the B. & W. Cafeteria because of their race. Thus, the affirmance of the conviction was based on a theory directly contrary to that under which the petitioners were charged and the case went to the jury. As this Court said in *Cole* v. *Arkansas,* 333 U. S. 196, 201:

> [If a state] provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall.

Here, as in *Cole,* the State Supreme Court did not affirm the "conviction on the basis of the trial petitioners were afforded." The affirmance was on a theory directly contrary to that under which the jury was instructed.

It is obvious that the jury might have reached a different result if it had been instructed that the B. & W. Cafeteria had no legal right to exclude petitioners because of race and violated their rights when it did so. Further, the jury was never instructed to consider the issue which the State Supreme Court did decide, that is, whether petitioners' method of seeming to vindicate their (assumed) right to enter the cafeteria was unlawful. Thus, the conviction clearly must be reversed under the holding of *Cole* v. *Arkansas, supra,* at 202:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

It is submitted that the Tennessee Supreme Court's disposition of the petitioners' appeal on grounds not considered at the trial denied them due process.

IV.

Petitioners Were Denied Due Process in Violation of the Fourteenth Amendment When the Trial Judge Instructed the Jury That Petitioners Were Charged With Violation of a Statute When (a) Petitioners Had Not in Fact Been Indicted for Violation of the Statute and (b) It Was Not Even a Criminal Statute.

Petitioners were indicted for violating Section 39-1101(7) and Section 62-711 of the Code of Tennessee. In his instructions, however, the trial judge told the jury that petitioners were charged not only with violation of §39-1101(7) and §62-711, but also that they were charged with a violation of §62-710 (B.E. 1110-1111; 1116). Section 62-710, which is not a criminal law at all, merely abrogates the common law responsibility of innkeepers and other keepers of public places to serve all comers and gives them the right to control the admission or exclusion of persons in such places. It had been mentioned in the indictment, but there was no indication that petitioners were charged with violating it. But, after reading all three laws to the jury the trial judge on two separate occasions told the jury that the defendants were charged with violating §62-710 (B.E. 1110; 1116).[23] Petitioners' motion for new trial

[23] The trial judge told the jury (B.E. 1110-1111):

> . You will note from the language of the presentment that the defendants are charged with the offense of unlawful conspiracy to violate Code Section 39-1101(7), Code Sections 62-710 and 62-711, in that they did unlawfully commit acts injurious to the restaurant business, trade and commerce of Burrus & Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee.

And also at B.E. 1116-1117 he said:

> . . . If you find and believe beyond a reasonable doubt that the said defendants unlawfully, wilfully, knowingly, deliber-

urging this as a denial of due process was overruled (R. 42-43).

The action of the trial judge in twice instructing the jury that they could convict petitioners upon a charge not made or even capable of being made, clearly violated petitioners' rights to due process of law. In *Stromberg* v. *California*, 283 U. S. 359, a conviction based on a general verdict under a state statute was set aside because one part of a statute submitted to the jury was unconstitutional. In *Terminiello* v. *Chicago*, 337 U. S. 1, the court in instructing the jury about a city ordinance did so with a theory which permitted conviction on an unconstitutional basis.

Here, the statute which petitioners were alleged to have violated is not even a statute under which one may be criminally punished. Moreover, petitioners were never charged with its violation. In *DeJonge* v. *Oregon*, 299 U. S. 353, 362, this court said: "Conviction upon a charge not made would be sheer denial of due process."

The Supreme Court of Tennessee attempted to explain away the manifest error of the trial judge by correctly characterizing Section 62-710 as a civil statute abrogating the common law, but this in no sense can be taken as a

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ately and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Tennessee Code Section 39-1101-(7) and Code Sections 62-710 and 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee, as charged in the presentment, then it would be your duty to convict the defendants; provided, that they, or one of them, did, in pursuance of said agreement, or conspiracy, do some overt act to effect the object of the agreement; that is, if you find that said agreements and acts in the furtherance of said objective were done in Davidson County, Tennessee.

cure of the fundamental evil involved here. By interjecting provisions of law which not only confused the jury, and which may have provided a basis for conviction not present in Section 39-1101(7) and Section 62-711, the conduct of the trial judge placed petitioners in jeopardy of conviction upon a charge never made, under a law incapable of sustaining a conviction, and for conduct not even made criminal by state law. The Tennessee Supreme Court acknowledged that this was error, but deemed it harmless (App. 9a). The Court's description of what occurred, focused merely on the fact that the trial judge read §62-710 to the jury. But petitioners' objection was that the judge twice told the jury that they were charged with violating §62-710, when this was not the case. Obviously this incorrect instruction about what was charged may well have affected the verdict and cannot be regarded as harmless. Indeed it is difficult to conceive any more harmful instruction than an incorrect statement of the crime charged.

The State Supreme Court's statement that "there were no questions raised following the charge about the propriety of reading it [§62-710]" misses the mark on several counts. First, the petitioners sought and were refused an instruction contrary to the one given to the effect that notwithstanding §62-710, the restaurant had no right to exclude them (B.E. 1126). Secondly, they did object, by motion for new trial to the reading of this statute (R. 42-43). Thirdly, they also objected, on due process grounds, to the trial judge's misstatement of the offense charged, in the motion for new trial (R. 43). Finally, there is nothing in the opinion below to indicate that this objection came too late. The stated ground of decision below was "harmless error" and not any theory that the objection was not timely. In any event there were no objections made to the instructions given in *Stromberg* and *Terminiello, supra.*

V.

Petitioners Were Denied a Fair and Impartially Constituted Jury Contrary to Due Process of Law and Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution.

Almost without exception, the white veniremen, including some of the twelve persons who tried and convicted petitioners, upon extensive examination by petitioners' counsel during *voir dire*, admitted a firm and life-long practice, custom, philosophy and belief in racial segregation. Most of the veniremen expressed belief that a restaurant owner had a right to exclude anybody, including Negroes, from his place of business.

Despite this fact, the trial judge in every instance overruled petitioners' challenges for good cause and held certain white jurors competent. For instance, Herbert Amick was held competent by the trial court over petitioners' challenge after testifying:

> Q. But you think that a business open to the public should be allowed to exclude Negroes?
>
> A. If they so desire, yes.
>
> Q. A restaurant business, then specifically,—in particular? And having that opinion where in the indictment in this case charges that the B & W Cafeteria had had such a rule, and that these defendants went there and sought service, knowing that the B & W had such a rule and then you would start out with a prejudiced attitude toward these defendants?
>
> A. Well, I would—
>
> Q. By reason of your belief?
>
> A. I would believe the B & W would be right in this case on their position.

Q. And you would start—what I am saying, though is you would start out in this case with a prejudiced attitude toward the defendants, wouldn't you?

A. In this particular case, I imagine I would (B.E. 452-453).

Similarly, the trial court held competent other jurors, over petitioners' objections for cause, who testified that their entire lives and all their personal associations had been on a segregated basis without any contact with Negroes on a basis of equality (B.E. 665-669, 756, 759).

In the case at bar, where the very issue to be tried was the right of a restaurateur to exclude persons on the basis of race, the trial judge's failure to exclude these jurors with admittedly preconceived notions against Negroes and in favor of B. & W.'s practice of racial segregation, was highly prejudicial and denied petitioners' right to trial by a fair and impartial jury.

This Court has repeatedly recognized that "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Smith* v. *Texas,* 311 U. S. 128, 130; *Glasser* v. *United States,* 315 U. S. 60, 85; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 218, 220. This Court has also recognized that racial prejudice is a valid ground for disqualification of a juror, *Aldridge* v. *United States,* 283 U. S. 308. In *Aldridge* it was said:

> . . . [T]he question is not as to the civil privileges of the Negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment . . . one of them was shown to

entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit (283 U. S. at 314).

It is clear that the jurors described above and declared competent by the trial court were incapable, by virtue of their segregationist beliefs, to render petitioners a fair and impartial verdict and that their presence as jurors prejudiced petitioners' right to an unbiased trial. Such action denied due process as well as equal protection of the laws. The test established in *Aldridge, supra,* is more than met here.

CONCLUSION

Wherefore, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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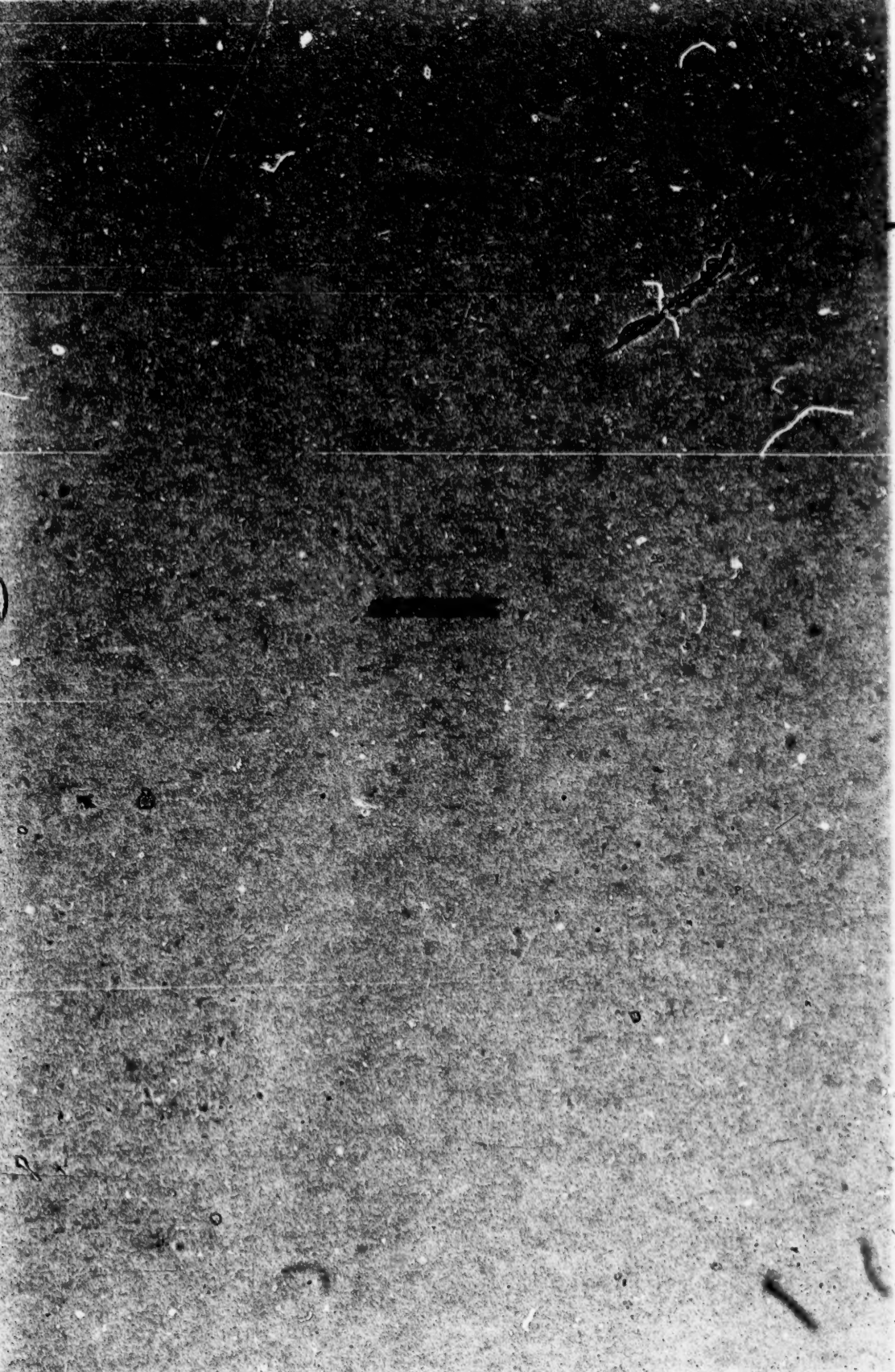

APPENDIX

DAVIDSON CRIMINAL

HON. JOHN L. DRAPER, *Judge*

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,

—v.—

STATE OF TENNESSEE.

For Plaintiffs in Error:

Looby & Williams
Nashville, Tennessee

For the State:

Thomas E. Fox
Assistant Attorney General

Opinion

The plaintiffs in error were convicted of conspiring to injure the business of the B & W Cafeteria by blocking the entrance thereto in the event they were denied entrance to and service in said cafeteria. The jury recommended a fine of less than $50.00. The trial judge sentenced each of these defendants to ninety days in the Davidson County workhouse and fined each of them $50.00. An appeal was seasonably perfected, able briefs filed, and oral arguments were heard, and, after a thorough study of the record and applicable authorities, we now have the matter for disposition.

Opinion

The indictment alleges a violation of two sections of the Tennessee Code, §39-1101 (7), T. C. A., and §62-711, T. C. A. The pertinent part of §39-1101, T. C. A., is as follows:

> "The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce . . ."

Section 62-711, T. C. A., provides, in part, that "any person guilty of turbulent or riotous conduct within or about" any hotel, inn, restaurant, etc., is subject to indictment and a fine of not less than $100.00. Section 62-710, T. C. A., was also mentioned in the indictment and the trial court's charge, but the defendants were not charged with violating this Section of the Code; nor could they have been so charged since this Section does not purport to define an indictable offense. It was mentioned merely to indicate that the B & W Cafeteria was permitted, by statute, to refuse admittance to any person whom it did not desire to serve.

There are thirteen assignments of error. They will not be taken up seriatim, but all of them will be treated and answered in the course of this opinion.

At about 12:20, P.M., Sunday, October 21, 1962, just after many church services had ended, and at a time when the patrons of the B & W Cafeteria were arriving for lunch, the defendants appeared at the entrance of the cafeteria which is located on Sixth Avenue, in the heart of Nashville, Tennessee. When they arrived, they were informed by the doorman that the cafeteria did not serve colored people and that they could not enter. Despite this,

the defendants remained at the entrance to the cafeteria and insisted that, "We are coming in and are going to eat when we git in."

The defendants were asked in a polite way to move along and to refrain from making any trouble. At this time, they had entered a vestibule to the cafeteria, the size of which is estimated as being from four feet by four feet to six feet by six feet and four inches. The defendants were in the vestibule, but were not permitted to enter the main part of the restaurant. After the defendants refused to remove themselves from the vestibule and after the acts hereinafter set forth had been committed, the police were called and they escorted the defendants away.

In considering the evidence hereinafter briefly summarized, we must remember that, in this State, fact determinations and reasonable inferences to be drawn therefrom are for the trier of facts, in this case the jury. On a review of a judgment of conviction, if there is material evidence to support the judgment, the defendants are presumed to be guilty and this Court will not reconsider the question of whether or not the evidence shows that they are guilty beyond a reasonable doubt; but will consider only the question of whether the evidence preponderates against their guilt and in favor of their innocence. *Smith and Reynolds* v. *State*, 205 Tenn., 502, 327 S. W. 2d, 308 (1959), certiorari denied by the Supreme Court of the United States, 361 U. S., 930, 80 S. Ct., 372, 4 L. Ed. 2d, 354 (1960).

The record clearly shows that these defendants physically blocked the entrance to the B & W Cafeteria by placing themselves in this small vestibule so as to prevent people from entering or leaving; and that entrance to and exit from the restaurant was not possible without squeezing

and worming through the wall of flesh created by the defendants' presence and position. The evidence likewise shows that in blocking this entrance, the defendants were pushing and shoving to some extent in an effort to enter this restaurant, but were prevented from doing so because the doorman kept the inner door closed to them. For example, one of the State's witnesses testified about the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. . . ."

A number of other witnesses testified to this state of facts and as to things they heard while they were trying to get in or out of the restaurant. Probably under the record, one or two white people did squeeze their way either in or out while all of this was going on, but nevertheless these defendants refused to vacate the vestibule until they were peacefully escorted away by the police. The record clearly shows that after the vestibule was cleared, the people inside the restaurant were able to go out and the people outside the restaurant were able to enter. There is also proof that there were as many as seventy-five people on the outside attempting or wanting to get in while these defendants were in the vestibule.

Section 39-1101, T. C. A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead

to a breach of the peace. The charge here, as it is clearly set forth in the indictment, is that the defendants crowded into this small vestibule and through their actions, as detailed above, committed an act injurious to trade and commerce. When two or more persons conspire to commit an act such as this, §39-1101, T. C. A., provides that they shall be guilty of a conspiracy. Section 62-711, T. C. A., in part provides that when a person is guilty of turbulent or riotous conduct within or about restaurants, hotels, etc., he may be indicted and fined not less than $100.00. One of the questions raised by the defendants is whether the indictment in this case sufficiently describes the offense to meet the requirements of §40-1802, T. C. A., which provides that the indictment must state the facts in ordinary and concise language so as to enable a person of common understanding to know what was intended, etc. Clearly, the indictment in this case, which consists of over a legal page in 10 point type, informs each of the defendants of the conduct for which he has been indicted, and the statutes which the State contends that such conduct has violated.

The defendants through various motions and throughout the trial attempted to say that this prosecution was brought for the purpose of enforcing a rule of segregation or racial exclusion in facilities licensed by the State, open to the public, and vested with public interest; and that such a prosecution is contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. From a very careful examination and reading of the record, the indictment, and the charge of the court, we certainly feel that such questions are not determinative of this prosecution. We can assume for the sake of argument that discrimination based on race by a facility such as this cafeteria does violate the due

process and equal protection clauses, but these questions are not presented here. A careful reading of this record shows that the only question is whether or not these defendants were attempting, in an illegal manner, to correct what they deemed to be an unconstitutional practice on the part of this cafeteria; and, if the method which these defendants adopted was illegal, whether it constitutes a misdemeanor under the Sections of the Code under which they were indicted.

This Court long ago in *State* v. *Lasater,* 68 Tenn., 584 (1877), held that an indictment under §62-711, T. C. A., was good and that the act was constitutional. In that case, a judgment quashing the indictment was reversed where the indictment alleged that the defendant had been guilty of turbulent and riotous conduct within and about a hotel by quarreling, committing assaults and batteries, breaches of the peace, loud noises, and trespass upon a hotel. It seems to us that there is sufficient proof in the instant case, which the jury apparently believed, to warrant the conviction under this Section. The word "riotous" is defined by Webster's New World Dictionary as "having the nature of a riot or disturbance of the peace." The conduct of the defendants certainly meets this definition. Nowhere in this record is it insisted that there was not a prior agreement to engage in such conduct if entrance to this restaurant was denied. In *Smith and Reynolds* v. *State, supra,* this Court had occasion to define a criminal conspiracy. This definition seems to meet the situation here. We likewise held in the *Smith and Reynolds* case that a conspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more

persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two or more persons to do something unlawful, either as a means or as an ultimate end. While the request for admittance by the defendants was not criminal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises of the restaurant, the method they employed to effect their admittance was clearly unlawful.

It is very earnestly and ably argued by counsel for the defendants that to prevent the defendants from acting as alleged in the indictment would constitute a denial of freedom of speech in contravention of the 1st Amendment to the Federal Constitution as made applicable to the States through the 14th Amendment. Of course, in this country, a person has a right to speak freely and a denial of this right offends our heritage of freedom. The individual must feel free to speak his mind; the press must be free to publish its opinion; and the movies must be free to express their views. There are literally hundreds of different agencies to whom freedom of expression is guaranteed. But around such freedoms there must be certain safeguards for the protection of society and when these safeguards are violated, the violator is subject to civil or criminal sanctions or both. Thus one cannot be allowed to recklessly shout "fire" in a crowded theatre. In crowding into this narrow vestibule and effectively blocking the entrance to this restaurant, the defendants interfered with the right of other individuals to come and go in the furtherance of trade and commerce and in so doing they violated the Sections of the Code hereinbefore set forth. See *Feiner* v. *New York*, 340 U. S., 315, 71 S. Ct., 303, 95 L. Ed., 295 (1951).

Had this been a labor dispute, the actions of the defendants would clearly be beyond that of peaceful picketing, which does not include in its definition any form of physical obstruction or interference with business. It is well established that labor has the right to peacefully picket and thereby express its views on the subjects involved in a labor dispute. But the picketing must be peaceful. When it goes beyond the peaceful stage and involves force, violence, threats, terror, intimidation, coercion and other things of like kind, it cannot be tolerated and those persons guilty of such acts are subject to state and federal laws. By analogy, if the conduct of the defendants here transcended the bounds of peaceful picketing, they would, under the evidence in this record, be guilty of acts injurious to trade. We think that their conduct clearly goes beyond the bounds of peaceful demonstration and picketing.

It is very forcefully insisted that the two Sections of the Code under which this indictment was laid should have been declared unconstitutional because they do not clearly and sufficiently define the offense charged against the defendants. In all the years that these Code Sections have been the law in this State, this question has not been raised as far as we can determine. As far as we know, there is no criminal statute which describes every specific kind of violation that might be indictable under it; but so long as the statute generally states, as these statutes do, what is prohibited, their constitutionality cannot be challenged for indefiniteness. We think that the statutes now under consideration clearly set forth the offense intended and that the indictment framed thereunder clearly sets forth the way in which these defendants allegedly violated their provisions.

In his charge to the jury, the trial judge (page 1109 of the transcript) told the jury that the presentment charged the defendants with the offense of an unlawful conspiracy to commit acts injurious to the B & W's business in violation of Code Sections 39-1101 (7), T. C. A., and 62-711, T. C. A. Following this, he read these various sections of the code to the jury, including §62-710, T. C. A., and then on the following page of his charge, he set forth the provisions of §62-710 once again. It is argued in behalf of these defendants that the charging and reading of §62-710, T. C. A., which does not purport to define a criminal offense, but is instead a civil statute, was error. A careful reading of the indictment and the whole charge shows that the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section. There were no questions raised following the charge about the propriety of reading it and we do not see how reference to a civil statute such as this, although error, could affect the jury's verdict, since there was ample evidence to convict the defendants of the offense defined in the other sections of the code charged.

It would not have been an unlawful conspiracy for the defendants to agree to seek entry into this cafeteria for the purpose of being served food coupled with an overt act in furtherance of this agreement; but any agreement to obstruct the entrance of a place of business and thus injure their business does constitute an unlawful conspiracy.

Among other requested special instructions was one to the effect that the State had abandoned the portion of the indictment charging a conspiracy to violate §62-711, T. C. A. We think that this special instruction was properly refused by the trial court because the whole case is built upon the theory that the defendants' actions in ob-

structing this passageway was the overt act committed in furtherance of this conspiracy.

Another requested instruction was to the effect that the cafeteria had no legal right to refuse to serve a person because of his race or color. As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway. As citizens, we are not permitted to take the law in our own hands and correct what we consider to be wrongs, except in the abatement of a private nuisance and then we can act only when we can do so without committing a breach of the peace. When we thus commit a breach of the peace by attempting to assert our rights, we are liable under the law for this breach of peace. "Two wrongs do not make a right."

The cross-examination of the witnesses for the State by counsel for the defendants pitches their case on the proposition that if the restaurant people hadn't prevented their entrance they would not have blocked the door. This, of course, is an excellent argument to the jury; but at the same time even assuming that the restaurant people had no right to exclude these people from their premises, this does not permit these defendants to block this passageway.

It is argued and several volumes of this large record are taken up with the proposition that the jury was composed only of white persons whose "personal practice, custom, philosophy, and belief in complete racial segregation in virtually all aspects of their social existence" thus disqualified them to act as jurors in this case. The jurors on *voir dire* were questioned and cross-examined by counsel for both sides and by the court. See *Smith*

and Reynolds v. *State, supra.* Those who were accepted stated that even though they might have the social belief set forth in the above quotation from defendants' counsel, they could exclude this for the purpose of trying these defendants and could decide the case on the basis of the evidence and the law charged to them by the court. As we have said a number of times herein, this is not a case of racial segregation but is rather a prosecution for a conspiracy to obstruct trade. There were a number of Negro jurors examined but all of them were excused for one reason or another and no Negro was on the jury; but there is no constitutional requirement that a trial be by a mixed racial jury. If there has been no illegal exclusion of these people from a jury, regardless of their color, then there is no constitutional violation of the rights of the parties. As we said in *Kennedy* v. *State,* 186 Tenn., 310, 210 S. W. 2d, 132 (1947):

> "It should be borne in mind that members of the Negro race have no constitutional right to trial by a mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries."

No such discrimination is shown in this case.

Finally it is insisted that the judgment of the court was inconsistent with the verdict of the jury. The jury found each of the defendants guilty and agreed upon a fine of less than $50.00, but did not fix any amount. The trial judge charged the jury that if they did find the defendants guilty under §39-1101, T. C. A., they could impose punishment of imprisonment in the county jail or workhouse for not more than one (1) year and a fine not exceeding $1,000.00 or both, as provided by the statute. He

then went on to charge the jury, after reading the statute, that if they convicted these defendants "and believe that a fine of $50.00 or less would be sufficient punishment, then all you need to say in your verdict is that you find the defendant, or defendants, guilty, and the court will fix the punishment." All the jury was trying to do in its verdict was to state that they found the defendants guilty and fixed a fine at less than $50.00 according to the charge of the court. By Article 6, Section 14 of the Tennessee Constitution, no fine in excess of $50.00 may be fixed except by a jury. Section 40-2525, T. C. A., contains the same provision. Thus all the trial judge was doing was trying to comply with this constitutional and statutory provision. The trial judge had the right and discretion to levy a fine, if the jury found them guilty, up to $50.00 and to attach a workhouse sentence, if, in his discretion, he thought the facts merited such punishment. Clearly, he has not abused this discretion in doing what he did here. If the defendants had wanted the jury to fix the fine and imprisonment, if the jury found them guilty, all they had to do at the beginning of the trial was to make the proper request, as provided by §40-2704, T. C. A., that this be done, and if such had been done then the trial judge would have had no authority to fix this fine and imprisonment as he did. Under the situation here, the fine and imprisonment which he levied were clearly in accordance with his right and duty.

Counsel for the defendants in his able brief argues that *Peterson* v. *City of Greenville,* 83 S. Ct., 1119 (1963) and *Lombard* v. *State of Louisiana,* 83 S. Ct., 1122 (1963) are applicable. These two cases are distinguishable from the instant case. The trespass complained of in the *Peterson* and *Lombard* cases was the act of sitting on a stool at

a lunch counter. This is basically an innocent and unoffensive act. It was only unlawful, in the eyes of the city and state concerned, because of a city ordinance in the *Peterson* case and an executive directive in the *Lombard* case, both of which required segregation of the races in public facilities. But absent the governmental mandate and the color of the defendants' skin in those two cases, and the act is basically unoffensive and innocent. This is not so in the instant case. *Stripped of any question of race and discrimination, the act complained of is still unlawful.* In the instant case, if these eight defendants had been white boys, their acts would still have been unlawful. We cannot escape from the fact that these eight defendants were blocking the entrance to the doorway of the B & W Cafeteria. Regardless of who they were and why they were blocking the doorway, their conduct is still basically unlawful.

In the instant case, we are presented with the timely question of how far a person can go to secure his constitutional rights. Now it seems clear that a person cannot commit an assault on another to gain these rights. It seems equally clear that one cannot damage the property of another with impunity because the other has committed an act of racial discrimination against him. We think that it is also clear that these eight defendants cannot interfere with the B & W's trade by blocking the latter's doorway in order to redress the wrong that they feel the cafeteria has visited upon them. The securing of constitutional rights must be done in a lawful manner.

As a result of what we have said herein, the convictions must be affirmed.

/s/ Hamilton S. Burnett
Hamilton S. Burnett,
Chief Justice.

Judgment

SUPREME COURT
NASHVILLE

Davidson Criminal

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,

—VS.—

STATE OF TENNESSEE.

Affirmed.

Came the plaintiffs in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof, this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, the plaintiffs in error, for the use of the County of Davidson the sum of $50.00, each, the fine assessed against each of them in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the cost of the appeal.

It is further ordered by the Court that each of the plaintiffs in error be confined in the County Jail or Workhouse of Davidson County, subject to the lawful rules and regu-

lations thereof, for a term of ninety days; and that after expiration of the aforesaid term of imprisonment, they remain in the custody of the Sheriff of Davidson County until said fines and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Davidson County, for the execution of this judgment.

The Clerk of this Court will issue duly certified copies of this judgment to the Sheriff and the Workhouse Commissioner of Davidson County to the end that this judgment may be executed.

1/8/64.

Opinion on Petition to Rehear

DAVIDSON CRIMINAL

LESTER G. MCKINNIE, *et al.*,

—v.—

STATE OF TENNESSEE.

The plaintiffs in error through able counsel have filed herein a courteous and dignified petition to rehear. After very carefully considering this petition and the brief in support thereof, we must conclude that it is nothing more than a reargument of the questions presented at the time this case was originally heard.

One additional authority is cited, *State of Delaware* v. *Brown*, 195 A. 2d, 379. This Delaware case is in no wise in point herein. The same reasons that we assigned as to why *Peterson* v. *City of Greenville* and *Lombard* v. *State of Louisiana* were not in point are applicable to the *Brown* case. In the *Brown* case, Brown, a Negro, entered the premises of a restaurant and requested service of food. The proprietor denied him service solely because of his race, and, upon his refusal to leave, obtained a warrant for his arrest for violation of the criminal trespass statute of Delaware. That is not the question here.

Basically and essentially the whole argument made originally, and now made, is based upon the philosophy and legal reasoning which summed up may be stated thus: in so long as our motives are right we can pursue any means (even though illegal and unlawful) we may choose to accomplish those motives. The authorities cited by the plaintiffs in error all go to the proposition that the motives of

these plaintiffs in error were lawful. There is no authority, nor so far as we know can any be found, whereby one may resort to unlawful and illegal means to accomplish lawful motives.

After thoroughly considering this petition to rehear and the matter again, we are convinced that the means employed by these plaintiffs in error to accomplish their motives were illegal and unlawful, and it is for this alone that they are convicted. Under the factual situation of this case by their using these illegal and unlawful means they have thus violated fundamental law and are guilty. The verdict against them for reasons set forth in our original opinion must be sustained. The petition to rehear is accordingly overruled.

/s/ HAMILTON S. BURNETT
Hamilton S. Burnett,
Chief Justice.

Petition to Rehear Denied

SUPREME COURT

NASHVILLE

DAVIDSON CRIMINAL

LESTER G. MCKINNIE, *et al.*,

—VS.—

STATE OF TENNESSEE.

PETITION TO REHEAR DENIED

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of the petitioner. 3/5/64.